UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

GRAHAM AUTOMOTIVE, INC. d/b/a VALLEY HONDA

Employer

and **Case** 6-RD-1552

WILLIAM C. BONNEY, An Individual

Petitioner

and

DISTRICT LODGE 83, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Union

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Graham Automotive, Inc. d/b/a Valley Honda, operates an automobile dealership in Monroeville, Pennsylvania, where it employs approximately nine bargaining unit employees. The Petitioner, William C. Bonney, an individual, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to decertify the Union, District Lodge 83, International Association of Machinists and Aerospace Workers, AFL-CIO, in a unit of all full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.[1]

[1] At the hearing, and renewed in a post-hearing letter to the Regional Director as well as in its post-hearing brief, the Union moved that the instant petition should be dismissed because the showing of interest which supported the petition was assertedly tainted. In accordance with longstanding precedent that the showing of interest is a matter for administrative determination, and is not litigable by the parties, e.g., Potomac Electric Power Company, 111 NLRB 553, 554 (1955), the Union's assertions were

At the hearing and in their briefs, the parties disagree on whether a collective-bargaining agreement signed by the Union is a bar to an election. The Employer asserts that there is no contract bar to a decertification election because the Employer never signed the collective-bargaining agreement that the Union signed and presented to the Employer on January 31, 2005. Thus, the Employer contends that there was no contract bar in effect when the Petitioner filed the instant petition on February 9, 2005. The Union, contrary to the Employer, asserts that a contract was agreed upon and ratified by the membership on January 7, 2005, and a signed copy of the final agreement was delivered to the Employer on January 31, 2005. Therefore, the Union contends that the instant petition is barred by the contract bar doctrine.

I have considered the evidence and the arguments presented by the parties on the issue of the contract bar doctrine. As discussed below, I have concluded that, because the agreement was never signed by the Employer prior to the filing of the instant petition, there is no contract bar to an election. Accordingly, I have directed an election in a unit that consists of approximately nine employees.

To provide a context for my discussion of the issues, I will first provide an overview of the facts in this case. Then, I will present in detail the legal analysis and reasoning that supports my conclusion on this issue.

I. FACTS

The Employer operates a Honda dealership located in Monroeville, Pennsylvania. In addition to the sale of new and used Honda vehicles, there is also a service department, which is the area of the Employer's operations that is at issue herein. The service department employs about seven service technicians and two team leaders, all of whom were included in

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administratively investigated. Following that investigation, by letter dated March 10, 2005, the undersigned denied the Union's motion.

the bargaining unit in this matter.[2] The Union was certified as the collective-bargaining representative of this unit on January 27, 2004, in Case 6-RC-12294.

The overall operations of the Employer are the responsibility of its president, James Graham. Graham, along with the Employer's counsel, John M. O'Connell, Jr., represented the Employer at the negotiations with the Union. The Union was represented at the negotiations by Union Business Representative Todd Fichera. Also present at the negotiations were team leader James Mendenhall and service technician Randy Campana.[3] The Union first contacted the Employer by letter a few days after the certification, requesting information and dates to meet. The parties engaged in negotiations at eleven meetings between February 24, 2004 and November 17, 2004.

By about July 2004, the parties seemed to be close to an agreement. There were still some issues to be decided, such as a management rights clause, union security and/or maintenance of membership clause, sickness and accident insurance, use of personal cars, and so forth.[4] The final meeting between the parties took place on November 17, 2004. On November 24, 2004, Fichera emailed to O'Connell the "latest" draft of the agreement, which incorporated changes agreed upon at the negotiations on November 17, 2004. Fichera stated in the email that there were still some articles to which the Employer needed to respond, and requested that O'Connell do so as soon as possible.[5] Fichera recalled that he received a FAX

[2] Tom Porter is the manager of the service department. The parties stipulated, and I find, that Tom Porter is a supervisor within the meaning of Section 2(11) of the Act inasmuch as he has the authority, inter alia, to direct the work of the employees in the service department.

[3] Grand Lodge Representative Paul Shemanski also attended one of the negotiation sessions, held on September 15, 2004.

[4] In June 2004, the parties mutually agreed to allow the Employer to give wage increases to the employees even though the entire collective-bargaining agreement had not been completed.

[5] Neither Fichera's testimony nor the email specifies what items still needed to be agreed upon at that point in time.

from O'Connell with some contractual language on December 20, 2004.[6] There were no further meetings between the parties in November and December 2004 or in January 2005.

On January 7, 2005, the members voted to ratify the agreement presented to them by Fichera. According to Fichera, the only issue not resolved at that time was the sickness and accident insurance. There were two possibilities for this insurance: one policy that the Employer currently provided to cover the employees and a second policy that the Employer was willing to provide. The second policy, according to the Employer, provided better coverage for less money. According to Fichera, Graham was willing to purchase either policy and agreed to allow the employees to decide which policy they preferred. The members chose the policy recommended by the Employer.

Fichera sent a letter to Graham on January 7, 2005, following the ratification vote. In this letter, Fichera informed Graham of the ratification and also informed him that a copy of the final draft of the contract was being emailed to O'Connell. Fichera stated that if everything appeared to be "OK", they could set up a date to sign the agreement. A copy of this letter was emailed to O'Connell along with the draft of the agreement that had been ratified. Fichera heard nothing from Graham following that letter. On January 11, 2005, Fichera sent a second letter to Graham, enclosing three dues deduction authorization forms. In the letter, he requested that the Employer begin deducting union dues from the three individuals who had signed the forms, since the collective-bargaining agreement had been ratified. Again, there was no response from Graham, although the Employer did subsequently begin to deduct the union dues as requested.

On January 24, 2005, Fichera received a FAX from O'Connell containing what O'Connell described as proposed changes to the collective-bargaining agreement. One matter that was

[6] A copy of this FAX was not entered into evidence, nor was there any testimony concerning the details of its contents.

outlined in the FAX was the proposed sickness and accident insurance coverage.[7] Two other items, relating to use of personal cars and drug and alcohol abuse programs, were also included in the FAX. According to Fichera, the only change relating to the use of personal cars was to change the language from the individual names of the parts and service managers to use only the job titles. With regard to the drug and alcohol abuse policy, according to Fichera, this article had been agreed upon earlier and inadvertently left out of the draft sent to the Employer.

On January 27, 2005, Fichera responded by email to O'Connell's FAX with the revisions to the agreement. In the email, Fichera asked O'Connell to let him know if the document appeared to be complete so that the Union could prepare a final version for signatures. On January 28, 2005, Fichera again sent an email to O'Connell stating that a typographical error had been corrected.[8]

On January 31, 2005, Fichera visited the Employer's facility. He brought with him two signed copies of the collective-bargaining agreement and a letter for Graham. Fichera had spoken to O'Connell by telephone prior to this visit to inform O'Connell of his plans. When Fichera arrived, Graham was not at the facility. Fichera wanted to see Jim Mendenhall and Randy Campana so that they could also sign the contract. At first, Tom Porter would not allow Fichera to see them, so Fichera telephoned O'Connell. O'Connell then instructed Porter to allow Fichera to see the two bargaining unit employees. Fichera left the letter and signed copies of the agreement with Porter, requesting that he give them to Graham. The letter requested that Graham sign both copies of the contract, retain one of them, and return one to

[7] The collective-bargaining agreement ratified by the members did not have a final version of the sickness and accident benefits. As described previously, the members voted at the time of the ratification to accept the Employer's proposed benefits, which are outlined in the FAX from O'Connell on January 24, 2005.

[8] It appears that this email was in response to some communication from O'Connell that is not reflected in the record.

the Union. Graham never signed the agreement, although he did begin deducting union dues from the members who had signed authorization forms.

II. LEGAL ANALYSIS

The party asserting that a contract is a bar to an election bears the burden of proving the facts establishing the applicability of the contract bar doctrine. The German School of Washington, D.C., 260 NLRB 1250, 1256 and cases cited therein (1982). The Board has established a very specific set of requirements for determining whether a contract bar exists in a situation where, between the time an agreement is reached on all of the issues in a collective-bargaining agreement and the signing of the agreement, a petition is filed. This rule, contained in Appalachian Shale Products Co., 121 NLRB 1160, 1162 (1958), clearly states:

> The Board adopts the rule that a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.

The Board reexamined its contract bar rules in Appalachian Shale Products Co. in order to achieve "a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives." Thus, "the doctrine's dual rationale is to permit the employer, the employees' chosen collective-bargaining representative, and the employees a reasonable, uninterrupted period of collective-bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire." Direct Press Modern Litho, 328 NLRB 860 (1999).

Therefore, it is well settled that for an agreement to serve as a bar to an election, such agreement must satisfy certain formal and substantive requirements. The agreement must be signed by all parties prior to the filing of the petition that it would bar, and it must contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. These requirements, set forth in Appalachian Shale Products Co., have been

applied in numerous Board decisions. See, e.g., Seton Medical Center, 317 NLRB 87 (1995); De Paul Adult Care Communities, 325 NLRB 681 (1998); Waste Management of Maryland, 338 NLRB 1002 (2003).[9]

In the instant case, while it appears that the parties had completed most if not all of the issues to be negotiated, the agreement had not been signed by both parties prior to the filing of the decertification petition. The members ratified a version of the contract on January 7, 2005, and during the rest of that month, Fichera and O'Connell worked out details and language issues that were still outstanding. On January 31, 2005, when Fichera presented the agreement to the Employer that had been signed by the Union, the Employer never said anything to the Union that would indicate there were any disagreements with the contract being presented. However, the fact remains that the Employer never signed the agreement prior to the filing of the petition. As noted above, the Board has made it clear that, in the context of a representation case, contracts not signed before the filing of a petition cannot serve as a bar. De Paul Adult Care Communities, supra; Appalachian Shale Products Co., supra. The Union herein did not meet its burden to prove that there was an agreement signed by both parties prior to the filing of the instant petition.

[9] In its brief, the Union argues that the Employer had implemented several provisions of the agreement, as evidence that the parties had reached a final agreement. However, the Board has held that an unsigned agreement will not bar a petition even though the parties consider the agreement completed and even though they have implemented some or all of its provisions. De Paul Adult Care Communities, supra at 681, citing Appalachian Shale Products Co., supra.

Further, in its brief, the Union attempts to compare the instant situation to the one in Waste Management of Maryland, supra. However, in Waste Management of Maryland, there were letters signed by both the Employer and the Union which together were considered by the Regional Director to embody an offer and an acceptance of a contract. In rejecting the Regional Director's conclusion, the Board did so on the basis that the parties' exchange of written materials left much doubt as to the terms of the alleged contract. In the instant case, there were no signed documents which could arguably be interpreted as an acceptance by the Employer. Thus, I find the Union's reliance on Waste Management of Maryland to be misplaced herein.

Accordingly, based on the above and the record as a whole, I find that there was no signed contract to serve as a contract bar when the decertification petition was filed by the Petitioner on February 9, 2005.

III. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer[10] constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time automotive service technicians and team leaders employed by the Employer at its Monroeville, Pennsylvania, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District Lodge 83, International

[10] The unit is described in conformance with the Certification of Representative issued in Case 6-RC-12294 on January 27, 2004.

Association of Machinists and Aerospace Workers, AFL-CIO. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **March 17, 2005**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **March 24, 2005**. The request may **not** be filed by facsimile.

Dated: March 10, 2005

/s/ Gerald Kobell
Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
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